No. 24-48

IN THE

Supreme Court of the United States

DAN GIURCA,

Petitioner,

v.

BON SECOURS CHARITY HEALTH SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Dr. Giurca seeks to appeal the portion of a decision on a motion to dismiss that dismissed his Title VII of the Civil Rights Act of 1964 ("Title VII") religious discrimination and failure to accommodate claims. His claims were based on the false premise that Bon Secours Charity Health System's adherence to a widely-disseminated code of conduct, the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"), interferes with Dr. Giurca's religious beliefs. Upon receiving employment contracts in 2017 that referenced the ERDs, Dr. Giurca commented that the ERD requirement was "unusual language" and, without ever having read the ERDs, he took a job at another hospital. Dr. Giurca subsequently admitted that he took the other job because it involved a better commute, and further admitted that he would agree to the ERDs themselves. However, he alleged that he could not sign the employment contracts because they included a reference to the fact the ERDs were promulgated by the Roman Catholic Church.

Against this backdrop, a more accurate statement of the questions presented is:

Whether the Court of Appeals was correct in holding that Petitioner did not state a Title VII religious discrimination claim where the complaint did not plausibly allege that any actions were taken based on Petitioner's religion?

Whether the Court of Appeals was correct in holding that Petitioner did not state a Title VII failure to accommodate claim where the complaint did not plausibly allege that Petitioner actually needed a religious accommodation?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Respondents Good Samaritan Hospital, Bon Secours Charity Health System and Westchester County Health Care Corporation, improperly named in the caption as "Westchester Medical Center Health Network" ("Hospital Respondents") state that no Hospital Respondent has a parent corporation, and no publically held corporation owns 10% or more of any Hospital Respondent's stock.

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INTRODUCTION

Dr. Giurca fails to meet the criteria for certiorari. Dr. Giurca seeks to review a non-precedential decision of the United States Court of Appeals for the Second Circuit ("Court of Appeals") which did not actually rule on Dr. Giurca's question presented, does not conflict with prior precedent, and does not present an issue of national importance. Instead, Dr. Giurca misconstrues the Court of Appeals' order as well as this Court's prior precedent, and disputes the Court of Appeals' application of settled law. His arguments do not provide any justification for further review by this Court and, as detailed in the prior submissions before the Court of Appeals, are unsupported and wholly meritless. Moreover, this case is an inappropriate vehicle for Dr. Giurca's question presented because Dr. Giurca is highly unlikely to prevail on his employment discrimination claims even if this Court granted certiorari. As the United States District Court for the Southern District of New York ("District Court") already held, Dr. Giurca could not have been hired by any of the Hospital Respondents due to his inability to meet a separate employment requirement – credentialing and privileging.

Certiorari should be denied.

STATEMENT OF THE CASE

Hospital Respondents And The Mandatory Code Of Conduct At Bon Secours

Westchester County Health Care Corporation ("WMCHealth") is a network of affiliated hospitals that provide integrated healthcare throughout the Hudson

Valley. (JA-69-70, 1280-1281, 1381).[1] Included within that network is Bon Secours Charity Health System ("Bon Secours"), a Catholic not-for-profit health system that includes Good-Samaritan in Suffern, New York; Bon Secours Community Hospital in Port Jervis, New York; and St. Anthony's Community Hospital in Warwick, New York. (*Id*., JA-60, 1177-1178).

The hospitals within Bon Secours differ from the others in the network in several respects, including in that they are Catholic-affiliated hospitals. (JA-1381; 71, ¶20). Like all Catholic-affiliated hospitals nationwide are required to do, Bon Secours has adopted the ERDs, which its physicians are required to follow as a pre-condition of employment, without exception. (*Id*.).

The ERDs govern the operation of a Catholic healthcare facility. (JA-114-156). They consist of 72 Directives, which are broken into six categories. (JA-124-126, 128-130, 132-135, 138-141, 143-146, 149-150). The document was published by the Roman Catholic Church and contains introductory language that provides background discussion on the history and rationale for the rules, but the ERDs themselves strictly consist of 72 Directives. It is important to distinguish the 72 Directives from introductory comments that explain the religious dogma that relates to the Directives because only the Directives – and not the explanatory matter – contain the applicable rules of conduct.[2] The six categories and their contents are as follows:

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1. Citations to "JA-_" refer to the pages of the Joint Appendix that was filed in the Court of Appeals.

2. The 72 Directives alone are set forth in the record at JA-158-173, while the Directives and introductory discussion combined are found at JA-114-56.

1. "The Social Responsibility of Catholic Health Care Services" (Directives 1-9) – nine Directives requiring healthcare facilities to: adopt the Directives, treat employees fairly, promote medical research, use medical services responsibly, serve vulnerable members of society, and follow specific rules in opening/closing a facility or modifying the mission of the facility. (JA-158-159).

2. "The Pastoral and Spiritual Responsibility of Catholic Health Care" (Directives 10-22) – thirteen Directives requiring healthcare facilities to provide pastoral care for all consistent with each person's religious and spiritual needs, whatever they may be. (JA-160-162).

3. "The Professional-Patient Relationship" (Directives 23-37) – fifteen Directives addressing the treatment of patients at the facility and touching upon respecting human dignity and patient confidentiality, informed consent, ethics committees, and informed healthcare decisions. (JA-163-166).

4. "Issues in Care for the Beginning of Life" (Directives 38-54) – seventeen Directives addressing the healthcare services that facilities may provide regarding conception, prohibiting, for instance, the destruction of human embryos, participation in surrogate arrangements, sterilization services,

promotion of contraceptives, and the provision of abortions. (JA-166-169).

5. "Issues in Care for the Seriously Ill and Dying" (Directives 55-66) – twelve Directives regulating the services to be provided to patients in danger of dying, requiring, among other things, that patients receive spiritual support of their choice, and forbidding euthanasia. (JA-169-172).

6. "Forming New Partnerships with Health Care Organization and Providers" (Directives 67-72) – six Directives that address partnerships with other healthcare facilities (JA-172-173).

Nothing in these Directives requires that any individual practice, agree with, or profess a belief in Catholicism. (JA-158-173). In fact, out of all the 72 Directives, only those in the third, fourth, and fifth categories directly impact the physicians at the facility, and those Directives regulate the types of medical services that physicians may offer at the facility and require that patients receive respect and treatment with informed consent. (*Id.*).[3]

3. Dr. Giurca's Petition focuses on Directives 1 and 9 to support the flawed argument that the ERDs step over the line from being a simple code of conduct to imposing a religious belief. But, not only is that argument flawed, but those Directives have nothing to do with Dr. Giurca. They are located in a category called "The Social Responsibility of Catholic Health Care Services," which is directed toward the healthcare facility itself. (JA-158-159). That category provides, *inter alia*, that the facility will

The Credentialing and Privileging Employment Requirement At WMCHealth

There is another employment requirement that applies for physicians: credentialing and privileging. (JA-367, 393, 1347, 1355, 1362, 1365, 1374-1375). Unlike the ERDs, this requirement is not limited to Bon Secours. (*Id.*). It applies all WMCHealth facilities, and is required by law whenever a physician receives an offer to work at any WMCHealth facility. (*Id.*); New York Public Health Law 2805-K. Put simply, this is a process by which New York hospitals determine whether a physician has the proper credentials and character to perform the work he or she seeks; and what services he or she can perform. (JA-1347, 1374).

The process officially begins once a physician submits a credentialing application to the Medical Staff Office. (JA-1375-1376). During this process, the Medical Staff Office will seek to review the entirety of the applicant's past work history and hospital affiliations, consistent with state and national best practices. (JA-1214, 1351-1365, 1375-1376). To that end, the applications seek, *inter alia*, personal references, past employment information and hospital affiliations, case logs, and any medical malpractice history.

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require its employees to adhere to the ERDs and follow specific rules in opening/closing a facility. (*Id.*) Also, Dr. Giurca relies heavily on non-ERDs matters – *i.e.*, – the preamble and other introductory language that are not part of the 72 Directives themselves but instead provide background discussion as to how the 72 Directives were developed. (JA-116-117). The rationale and history behind the 72 Directives are immaterial because the employment agreements did not require Dr. Giurca to affirm the rational underlying the ERDs. (JA-367, 393).

(JA-1352-1361, 1375). Once the application is submitted, a credentialing specialist will review the application and collect additional information, including public profiles, medical malpractice, and legal information. (JA-1351-1352, 1355, 1375-1376). This information is gathered by such means as running Google or media searches as well as queries with governmental sources. (JA-1351-1352, 1375-76). The credentialing specialist will also submit verifications to all prior employers as well as any entities at which the physician held clinical privileges. (JA-1356-1359, 1376). The verification seeks such information as dates of employment and/or Medical Staff appointment and, if the applicant has left the facility, requests an explanation as to why the applicant left that facility. (*Id.*). Should the facility fail to explain why the applicant left that facility, the Medical Staff Office will call the prior employer and request an oral response. (*Id.*).

At WMCHealth, once all of the requisite information is compiled, it will be sent to the Section Chief and Director who hired the candidate, as well as the Executive Medical Director. (JA-1354-1355, 1376). If those physician leaders want to proceed with the application, the Credentialing Committee will then review the information, and, in some rare instances, interview the applicant, before rendering a decision consistent with WMCHealth policies and the Medical Staff By-Laws that govern the particular facility at which the person was applying. (JA-1376).

However, if any red flags emerge when the Credentialing Specialist is compiling the requisite information, the application would be stalled before any information is presented to the Credentialing Committee. (JA-1364, 1376-1377). Red flags include lawsuits involving

patients, misrepresentations made by the applicant during the employment application process, lawsuits against prior employers that reflect a litigious employee with a poor employment history, or questionable quality of care information. (JA-1377-1378). If such red flags came to light, that candidate would not be credentialed and could not be hired. (JA-1364, 1378).

Dr. Giurca's Background And Poor Employment History

Dr. Giurca is a psychiatrist who previously worked for Montefiore Health System, Inc. ("Montefiore") and Orange Regional Medical Center ("ORMC"). (JA-259, 1022, 1034). These are, in fact, the first two entities that employed Dr. Giurca as a full-time hospital-based psychiatrist. (*Id.*). In both instances, Dr. Giurca's employment was highly unsuccessful. (*See e.g.*, JA-1022, 1034). After toxic employment disputes at his two prior employers, Dr. Giurca sued each of them. (*Id.*, JA-509-541, 447-464).

Dr. Giurca filed his first lawsuit against Montefiore in 2018. (JA-416). In that lawsuit, Dr. Giurca alleged, among other things, that (i) he received a Focused Professional Practice Evaluation accusing him of multiple failings, (ii) he was secretly recording his colleagues and supervisors and reporting them to the New York State Office for Mental Health Department of Health, (iii) he was put on a probation plan and then was told his employment was "not sustainable" and he was "blacklisted" from moonlighting, and (iv) lost his privileges to moonlight, and then was "blacklisted" from all Montefiore facilities. (JA-515, 514, 519-523, 523-524, 527, 531-535).

In 2019, Dr. Giurca likewise filed a lawsuit against ORMC and various administrators. (JA-431-432). His tenure at that hospital was just as unsuccessful as his prior job at Montefiore. Dr. Giurca alleged, among other things that, (i) after he submitted an article for publication, a doctor accused him of inappropriately using residents to develop the information for his article, (ii) he was secretly recording his colleagues and reporting them to the New York Office of Mental Health, (iii) ORMC fired Dr. Giurca and when he sought to obtain privileges at another hospital, (iv) ORMC harmed Dr. Giurca by reporting that he had been terminated without specifying the reason. (JA-452-435, 454-457).

All of this information has been readily accessible to the public for years. (JA-701, 1315-1318, 1320-1323, 1975-1976). Hospital Respondents even located an internet article about Dr. Giurca on December 5, 2019. (JA-700-701, 494).

Dr. Giurca's Attempts To Work Within WMCHealth

Against this backdrop, Dr. Giurca has sought work within WMCHealth on three occasions. The first time that Dr. Giurca sought to work within WMCHealth was in December 2016. (JA-71, ¶ 12). At that time, he declined an offer for a full-time job at a hospital within Hospital Respondents, instead choosing to work at ORMC. (JA-71, ¶ 12). Although he took the ORMC job, Dr. Giurca asked if he could be kept in mind for moonlighting opportunities. (*Id.*, JA-1195). Toward that end, Dr. Giurca began the process of submitting an application for Medical Staff privileges, and he received a copy of a professional services agreement in February 2017. (JA-362, 365-381). The

professional services agreement that Dr. Giurca received required, *inter alia*, that all medical services at the facility "be provided in accordance with…the Ethical and Religious Directives for Catholic Health Care Services." (JA-367) (underline omitted).

However, Dr. Giurca did not proceed with his Medical Staff application for clinical privileges. (JA-403, 858). He raised various objections, including a requirement to come onsite while on call and having to pay for insurance. (JA-383, 386-388). Dr. Giurca also brought up the requirement that physicians must abide by the ERDs, stating "This is very unusual language for employment." (JA-387).

Dr. Giurca agreed to go per diem, so Bon Secours sent Giurca a per diem contract. (*Id*., JA-390-400). That contract stated, *inter alia*, "[y]our employment is subject to the policies, procedures and guidelines of the PC and Hospital, including but not limited to…the Ethical and Religious Directives of the Roman Catholic Church." (JA-393). After receiving the contract, Dr. Giurca again raised objections to the requirement for coming onsite while on call, and did not go forward with his application for clinical privileges for moonlighting. (JA-403, 858). Dr. Giurca proceeded to work at ORMC until he was fired in October 2018. (JA-259, 408, 1034).

The second time that Dr. Giurca sought work within WMCHealth was some seven months later in November 2018, and after he had been fired from ORMC. (JA-408, 1039-1043). Dr. Giurca sought work at Good-Samaritan and contacted Tera Colavito, a person responsible for hiring at Good-Samaritan. (JA-411, 468-469, 471-472, 1040-1045). While no job was available, he had a screening

call with Ms. Colavito on March 5, 2019. (JA-471-472, 1186, 1196, 1211, 1226-1227). During the screening call, Dr. Giurca admitted that he had previously turned down the job with Bon Secours because ORMC had a better commute, and also falsely told her that he was still employed by ORMC. (JA-471). Dr. Giurca has admitted that he lied to Ms. Colavito when they spoke by falsely saying he was still employed by ORMC. (JA-471-472, 857, 1047-1051). Ms. Colavito discovered his lie almost immediately, and wanted nothing further to do with him. (JA-1210-1211).

The third time that Dr. Giurca sought to work within WMCHealth was in 2019. Dr. Giurca spoke to a recruiter for Westchester Medical Center, Andrea Ruggierio, and an interview was scheduled with Abraham Bartell, M.D., a psychiatrist at Westchester Medical Center. (JA-550-551, 626-632). Dr. Bartell, who knew nothing about the ERDs or Dr. Giurca's history, interviewed Dr. Giurca, did not like him, and recommended against hiring him. (JA-1150, 1161, 1261, 1267-1268, 1274, 1368-1370). When Jordy Rabinowitz, Senior Vice President, Chief Human Resources Officer, learned that Dr. Bartell did not want to hire Dr. Giurca at Westchester Medical Center, he told Ms. Ruggiero to issue a rejection notice to Dr. Giurca. (JA-692, 1165, 1311-1312).

Dr. Giurca's Complaint Allegations

One day before the rejection notice was sent, Dr. Giurca filed a complaint in District Court. (JA-648-690). In his pleading, which he amended, he alleged religious discrimination under Title VII, failure to accommodate under Title VII, retaliation under Title VII, an injunction

compelling Hospital Respondents to grant him the "accommodation" that he allegedly requested, and a state law claim for intentional and negligent infliction of emotional distress. (JA-246, 17-61).

Dr. Giurca alleges the "objectionable" employment requirement existed in two contracts that were offered to him in 2017 – some three years before his lawsuit – that required Bon Secours physicians to adhere to the ERDs when providing medical services at the hospital. (JA-20, 22, 28, 37, 47). Dr. Giurca also alleged that, while he asked for a copy of the ERDs, he admitted that it was not given to him. (JA-25, ¶49; 28, ¶58-59).

Dr. Giurca nevertheless alleged that, although he never received the ERDs and would accept "directives [that] consisted of a code of conduct," he believed that he was "religiously prohibited from subscribing to" Bon Secours' contracts for moonlighting services since they required adherence to the ERDs. (JA-20, ¶16, ¶18; 22, ¶28, ¶29 ¶31; 24, ¶41; 25, ¶49). Based on this belief, Dr. Giurca asserted that he asked Bon Secours to entirely remove the requirement that Dr. Giurca adhere to the ERDs. (JA-21, ¶ 22).[4] He further claimed that he objected to the ERDs and was not hired as a result. (JA-21-27). Based on these allegations, Dr. Giurca sought injunctive relief, back pay, punitive damages, compensatory damages for emotional distress, and attorneys' fees and costs. (JA-30-31, 995-996).

4. Dr. Giurca did not in fact ask for the removal of the contractual requirement. The record reveals that he simply noted that they were "unusual." (JA-387). The record also reveals that he did not forgo the contract because of the ERD contractual requirement. Rather, he admitted in 2019 that he simply took a job at ORMC because it offered a better commute. (JA-471).

Hospital Respondents Move To Dismiss And Dr. Giurca Admits He Would Comply With The Directives

Hospital Respondents moved to dismiss, and submitted a copy of the ERDs since the District Court could take judicial notice of it. (JA-114-156). *See e.g.*, *Overall v. Ascension*, 23 F.Supp.3d 816, 825 (E.D.Mich. 2014) ("The Ethical and Religious Directives are widely disseminated and must be followed by all Catholic Health Organizations. As the Ethical and Religious Directives are from a source whose accuracy cannot reasonably be questioned, the lower take judicial notice of this document."). Dr. Giurca then conceded that he would agree to adhere to the 72 ERDs, stating "[h]e could follow those Directives with regard to his employment conduct..." SupAppx.8.[5] Dr. Giurca further admitted that he had no objections with the Directives themselves but he could not sign the employment contracts because they included a reference to the fact that the ERDs were promulgated by the Roman Catholic Church. Dr. Giurca stated he "could have signed [the employment agreement]" if Hospital Respondents had just inserted the "[t]he 'ethical standards of behavior' in the ERD…into the contract, and" removed "the reference to [the ERDs] being promulgated by the Roman Catholic Church." SupAppx.21.

The District Court Dismisses Nearly All Claims On A Motion To Dismiss

On March 23, 2021, the District Court dismissed Dr. Giurca's claims for religious discrimination, failure

5. Citations to "SupAppx _" refer to the Supplemental Appendix that was filed in the Court of Appeals.

to accommodate, and infliction of emotional distress as deficient or inadequately pled. (SA-1-38);[6] 71a-77a; 83a-88a; 72a-83a. Only a limited retaliation claim survived the motion. (SA-19-21); 82a-83a.

With regard to the Title VII discrimination claim, the District Court held Dr. Giurca's allegations were deficient because the ERDs are "quite plainly…statements of how the signor will conduct his medical practice while employed by the hospital, not a statement of religious belief." (SA-14, 19); 72a. "[A]ll Plaintiff was required to do was to say that he agreed to comply with the ERDs at work; he was not required to say he personally agreed with the ERDs or the views of the Roman Catholic Church… He remained entirely free to disagree with and disregard the directives of the Church in his personal life." (SA-14-15); 73a. Furthermore, "[t]o the extent he believed the Agreements required him to state that he would be bound by Church doctrine in general, that is an implausible reading" and "an idiosyncratic, subjective misreading of the contract, which is secular conduct, not bona fide religious belief." (SA-15-16); 73a. Also, the District Court held "Plaintiff's claim also fails because he has not offered the Court any basis to infer that he was not hired for a discriminatory reason" since "not hiring someone because they will not sign their employment contract is not discriminatory reason." (SA-16-18).

As for the Title VII failure to accommodate claim, the District Court held that the claim failed for the essentially the same reasons: "[t]hat is, Plaintiff has not

6. Citations to "SA-_" refer to the pages of the Special Appendix that Dr. Giurca filed in the Court of Appeals.

plausibly alleged that signing the Agreements or adhering to them conflicts with his religion." 76a-77a (citing this Court's ruling in *EEOC v. Abercrombie & Fitch*, 135 S.Ct. 2028, 2033 (2015) for the proposition that a plaintiff must "actually require an accommodation of his religious practice").[7]

The District Court Grants Summary Judgment Dismissal Of The Lone Remaining Retaliation Claim

Following discovery, Hospital Respondents moved for summary judgment of the small retaliation claim that survived the motion to dismiss. (JA-237). On January 18, 2023, the District Court granted summary judgment, finding, among other things, that Plaintiff's objections to the ERDs were not protected activity. The District Court expressly called the ERDs a "code of conduct" and held "Plaintiff's objection to the ERDs cannot be protected activity because it was not objectively reasonable for Plaintiff to think he was protesting an employment practice made illegal by Title VII." *See* 21a; 52a. Also, the District Court held that Dr. Giurca did not meet his burden for additional reasons, including because Hospital Respondents had a legitimate, non-retaliatory reason not

7. Subsequently, on the summary judgment motion, the District Court was able to review transcripts of Dr. Giurca's conversations with Hospital Respondents because he secretly recorded conversations routinely. *See* 45a-46a. (*See e.g.,* JA-514, 471, 550). The District Court concluded that the recordings revealed Dr. Giurca never really objected to the ERDs. *See* 45a-46a. Rather, he asked if there was a religious qualification and never indicated that any "such requirement would be a dealbreaker for him." *Id.*

to hire him, and he failed to establish that he could have been hired at any of the Hospital Respondents absent the alleged retaliation. *See* 47a-52a. Among other clear facts, Dr. Giurca could not pass the credentialing and privileging process required at all of the Hospital Respondents and therefore could not be hired. *Id.*; (JA-1378).[8]

Dr. Giurca Appeals And The Court Of Appeals Affirms The District Court's Decisions

Dr. Giurca appealed the portions of the District Court's decisions that dismissed his Title VII claims to the Court of Appeals. In the Court of Appeals' order, which was amended on February 26, 2024, the Court of Appeals affirmed the District Court's decisions in their entirety. *See* 2a-9a; 9a-17a. With regard to the motion to dismiss, the Court of Appeals held the District Court did not err in granting Hospital Respondents' motion because Dr. Giurca's complaint allegations did not plausibly allege the elements required to state religious discrimination and failure to accommodate claims under Title VII. *See* 3a-5a.

8. The record also showed that Dr. Giurca admitted that he had lied to Ms. Colavito by saying he was still employed at ORMC when he had in fact been fired. (JA-471-472, 857, 1047-1051). Ms. Colavito discovered his lie immediately and wanted nothing more to do with him. (JA-1210-1211). Moreover, as the District Court held, the credentialing and privileging process would have revealed Plaintiff's lawsuits against his prior employers, and the facts alleged in those lawsuits, "including that he was fired from ORMC, lost privileges at Montefiore, was accused of misconduct, recorded his colleagues and supervisors, made repeated allegations about his colleagues to supervisors and state regulatory agencies, and had been deemed a security risk at Montefiore. . . would constitute significant 'red flags' that would have prevented Plaintiff from being credentialed." 47a-48a (internal record citations omitted).

With regard to the motion for summary judgment, the Court of Appeals held that the District Court did not err in granting Hospital Respondents' motion because Hospital Respondents demonstrated that they had legitimate, non-retaliatory reasons for their decision not to hire him, and Dr. Giurca did not demonstrate that retaliation was the but-for cause of their failure to hire him. *See* 6a-8a.

REASONS TO DENY CERTIORARI

A. The Courts Below Did Not Reach the Question Presented

Dr. Giurca asks this Court to grant certiorari to consider whether "an employer violates Title VII when it fails to hire a person because his sincerely held religious beliefs prohibit him from agreeing to recognize and adhere to the employer's religious views. . ." *See* Petition for Certiorari ("Giurca's Petition"). That question does not warrant granting certiorari because it was not part of the Court of Appeals' decision. The Court of Appeals' decision was premised on the allegations in the Amended Complaint, and the Amended Complaint did not allege that Bon Secours asked Dr. Giurca to recognize or adhere to its religious views. *See* 3a-5a.

Rather, the Amended Complaint alleged that Dr. Giurca received – and objected to – employment agreements that asked him to adhere to the ERDs in the course of his employment. (JA-98, § 1.2; JA-88, § 4). As the District Court held, the ERDs do not constitute religious views, but rather, are "quite plainly…statements of how the signor will conduct his medical practice while employed by the hospital, not a statement of religious

belief." (SA-14, 19); 72a. Dr. Giurca's question presented therefore was not actually decided by the Court of Appeals. Accordingly, there is no basis to grant certiorari on Dr. Giurca's question presented.

B. Dr. Giurca Does Not Present An Issue Of National Importance

Dr. Giurca also fails to present any issue of national importance that could warrant granting certiorari. He argues that the Court of Appeals' decision has "broad, national implications beyond just this case" regarding the application of Title VII because he claims "the number of hospitals adhering to the ERDs is on the rise." Dr. Giurca's Petition, p. 17. However, the Court of Appeals' decision is unpublished, expressly states that it does not have precedential effect, and was entirely premised on the specific allegations in the record. In that record, Dr. Giurca admitted that he had not even read the ERDs when he questioned the employment agreements, and later on, conceded that he would adhere to the Directives but he could not sign the employment contracts because they included a reference to the fact that the ERDs were promulgated by the Roman Catholic Church. *See e.g.*, (JA-22, ¶28, ¶29). SupAppx.21.

This circumstance is highly fact specific and Dr. Giurca offers no basis to suggest that such allegations could apply to doctors seeking employment at hospitals across the nation. Accordingly, Dr. Giurca has not presented any issue of national importance that warrants review.

C. This Case Is A Poor Vehicle To Address The Question Presented

This case also provides an inappropriate vehicle for addressing the question presented because it is highly unlikely that Dr. Giurca could ever prevail on the merits of his Title VII claims even if this Court were to grant certiorari and reverse on the question presented. As the District Court already held, mere adherence to the ERDs is not discriminatory and, in any event, Dr. Giurca could not be hired by any of the Hospital Respondents because his past employment history precluded him from passing a separate mandatory employment requirement – credentialing and privileging. *See* 42a, 47a-48a. Although the Court of Appeals affirmed the District Court's decision on other grounds and did not reach this issue, the District Court's decision is well-supported by the facts in the record. *Id.* Those facts clearly establish that credentialing and privileging was mandatory, and Dr. Giurca could not pass it and therefore could not be hired. *See supra*, footnote 8. Accordingly, since Dr. Giurca is unlikely to prevail on his Title VII claims regardless of the Court of Appeals' ruling on the motion to dismiss, we respectfully submit that this case is a poor candidate for review by this Court.

D. The Court Of Appeals' Decision Does Not Conflict With Prior Precedent

Dr. Giurca also fails to establish any conflict between the Court of Appeals' decision and prior precedent. His argument is premised on the incorrect notion that the Court of Appeals applied a legal standard that is "unduly high" and conflicts with this Court's ruling in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 728, 135 S. Ct.

2028, 192 L. Ed. 2d 35 (2015). As set forth below, the Court of Appeals applied well-established law that is consistent with *EEOC v. Abercrombie & Fitch Stores, Inc.*

1. The Decision In EEOC v. Abercrombie & Fitch Stores, Inc.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, a woman applied for a position at an Abercrombie store and wore a headscarf during her interview. 575 U.S. at 770, 135 S. Ct. at 2031, 192 L. Ed. 2d 35. Her interviewer suspected that she was wearing the headscarf for religious reasons and was concerned that her headscarf violated the company's Look Policy. *Id.* Based on this information and suspicion, the managers decided her headscarf would violate Abercrombie's "Look Policy" and decided not to hire her. *Id.* A claim was filed against Abercrombie, alleging violation of Title VII for refusing to hire the applicant because of her religious practice when that practice could be accommodated without undue hardship. *Id.*, at 575 U.S. 768, 135 S. Ct. at 2030, 192 L. Ed. 2d 35. The district court granted summary judgment to the plaintiff on liability, and the court of appeals reversed, finding that the failure to accommodate theory under Title VII attaches when a plaintiff shows the employer has actual knowledge of the candidate's need for a religious accommodation. *Id.*, at 575 U.S. at 771, 135 S. Ct. at 2031, 192 L. Ed. 2d 3.

This Court granted certiorari and reversed, finding the court of appeals "misinterpreted Title VII's requirements in granting summary judgment." *Id.*, at 575 U.S. at 775, 135 S. Ct. at 2034, 192 L. Ed. 2d 35 (2015). As this Court determined, Title VII "does not impose a knowledge requirement," but rather, it prohibits "certain

motives," *i.e.*, "an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on. . . ." *Id.*, at 575 U.S. at 773, 135 S. Ct. at 2032, 192 L. Ed. 2d 35. This Court held "[i]f the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor, the employer violates Title VII." *Id.*, at 575 U.S. at 773, 135 S. Ct. at 2033, 192 L. Ed. 2d 35. Accordingly, to establish failure to accommodate claim under Title VII, this Court ruled "an [employee] need only show that his need for an accommodation was a motivating factor in the employer's decision." *Id.*, at 575 U.S. at 772, 135 S. Ct. at 2032, 192 L. Ed. 2d 35. Said another way, where an employee's need for a religious accommodation is not a motivating factor in the employer's decision, there can be no violation of Title VII. *See id.*

In addition, this Court noted that "it is arguable that the motive requirement itself is not met unless the employer at least suspects that practice in question is a religious practice" but this Court declined to consider that issue in its decision since Abercrombie & Fitch at least suspected that the scarf was worn for religious reasons. *Id.*, at 575 U.S. at 774, n.3, 135 S. Ct. at 2033, 192 L. Ed. 2d 35.

2. The Court Of Appeals' Legal Standard For The Failure To Accommodate Claim Is Consistent With EEOC v. Abercrombie & Fitch Stores, Inc. And Well-Established Law

On the failure to accommodate claim, the Court of Appeals held that "a plaintiff may satisfy their minimal

burden on a motion to dismiss by plausibly alleging that they:"

> (1) 'actually require[] an accommodation of [his or her] religious practice"; and (2) that 'the employer's desire to avoid the prospective accommodation [was] a motivating factor in [an employment] decision.' *See* 3a-4a (citing *Lowman v. NVI LLC*, 821 F. App'x 29, 31 (2d Cir. 2020) (quoting *EEOC v. Abercrombie & 18 Fitch Stores, Inc.*, 575 U.S. 768, 773–74 (2015))).

Further, the Court of Appeals held "[i]t is not enough for plaintiff to assert that he desired an accommodation; he must plausibly allege that he actually required an accommodation of his religious practice—in other words, that his religious beliefs made such an accommodation necessary." 4a.

As a threshold matter, it is implausible for Dr. Giurca to say that this legal standard conflicts with *EEOC v. Abercrombie & Fitch Stores*, *Inc.* since the Court of Appeals' legal standard is largely a quote from *EEOC v. Abercrombie & Fitch Stores*, *Inc.*

Moreover, the small portion of the legal standard that is not a quote from *EEOC v. Abercrombie & Fitch Stores*, *Inc.* is consistent with that decision. That portion of the Court of Appeals' legal standard simply provides that a plaintiff must plausibly allege that he actually required an accommodation of his/her religious practice. *See* 4a. That requirement is in line with the finding in *EEOC v. Abercrombie & Fitch Stores*, *Inc.* that, to have a Title VII violation, an applicant must actually require an

accommodation of a religious practice, and the employer's desire to avoid the accommodation is a motivating factor in the employment decision. *See* 575 U.S. at 773, 135 S. Ct. at 2033, 192 L. Ed. 2d 35 ("[i]f the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor, the employer violates Title VII."). Accordingly, there is no conflict.

Additionally, with regard to Dr. Giurca's claim that the Court of Appeals' legal standard was "unduly high," Dr. Giurca does not cite to any case law that supports his argument, and the legal standard that the Court of Appeals applied is consistent with the legal standard applied by other federal courts. *See e.g., Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 765 (3d Cir. 2004), as amended (Dec. 20, 2004) (setting forth the requirements for a Title VII claim and affirming dismissal of claims based on national origin and religion, finding nothing in the plaintiff's complaint suggested that the employment requirement "conflicted with a sincerely held belief that was endemic to his professed national origin or religion claims"); *see also O'Connor v. Lampo Grp., LLC*, No. 3:20-CV-00628 ER, 2021 WL 4480482, at *6 (M.D. Tenn. Sept. 29, 2021) (dismissing allegations that plaintiff has religious beliefs that conflict with the religious beliefs underlying the employment requirement); *see Brennan v. Deluxe Corp.*, 361 F. Supp. 3d 494, 509 (D. Md. 2019) (quoting *U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017)) (holding plaintiff sufficiently pled a conflict between her religious beliefs and the employment requirement). Accordingly, there is no basis for granting certiorari on this issue.

3. The Court Of Appeals' Legal Standard For The Religious Discrimination Claim Is Consistent With EEOC v. Abercrombie & Fitch Stores, Inc. And Well-Established Law

On the religious discrimination claim, the Court of Appeals held that, to state an employment discrimination claim, "a plaintiff must plausibly allege that (1) the employer took adverse action against him and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." 3a. Stated another way, a plaintiff alleging religious discrimination must show that their religion was the motivating factor in the employment decision. *See id.*

This legal standard does not conflict with this Court's prior precedent. In light of *EEOC v. Abercrombie & Fitch Stores, Inc.*, the key element for a Title VII claim is whether religion is a motivating factor in the employment decision. *See supra*, p. 14-15. The Court of Appeals applied this key element in its legal standard and held Dr. Giurca did not plausibly allege that religion was a motivating factor in the employment decision. *See* 3a.

Dr. Giurca nevertheless argues that the Court of Appeals' pleading standard conflicted with *EEOC v. Abercrombie & Fitch Stores* because he claims the Court of Appeals required him to show the Hospital Respondents actually knew about his religion. There was no finding that Dr. Giurca was required to make any such showing. *See* 3a. Dr. Giurca is referencing the portion of the decision where the Court of Appeals applied the legal standard to the factual allegations and held Dr. Giurca did not plausibly allege that his religion was a motivating factor

in the Hospital Respondents' employment decision. *See id.* In that section, the Court of Appeals held Dr. Giurca's allegations that Hospital Respondents failed to process his application due to his religion were conclusory. *See id.* As the Court of Appeals explained, "he does not allege that the Hospital Defendants were aware of his Romanian Orthodox religion, much less that they took any actions based on that religion." 3a. The point is that Dr. Giurca did not plausibly allege that any actions were taken based on religion – which is required in light of *EEOC v. Abercrombie & Fitch Stores.*

Moreover, the fact that the Court of Appeals considered whether Hospital Defendants were allegedly aware of Dr. Giurca's religion does not conflict with *EEOC v. Abercrombie & Fitch Stores.* The Court of Appeals considered this factor when it evaluated the Hospital Defendants' alleged motive, *i.e.* whether they failed to process his employment applications due to his religion. *See* 3a. In *EEOC v. Abercrombie & Fitch Stores,* this Court expressly contemplated that, for the motive requirement, an employer would, at the very least, need to suspect that the applicant/employee has a religious need. 575 U.S. at 774, n.3, 135 S. Ct. at 2033, 192 L. Ed. 2d 35. It is implausible to see how an employer could suspect that the applicant/employee has a religious need if they had no awareness of the applicant/employee's religion. Given this, the Court of Appeals did not conflict with *EEOC v. Abercrombie & Fitch Stores* by considering that the Amended Complaint did not allege that the Hospital Respondents had any awareness of Dr. Giurca's religion.

Finally, with regard to Dr. Giurca's claim that the Court of Appeals' legal standard was "unduly high," Dr.

Giurca does not cite to any case law that supports his argument, and the legal standard that the Court of Appeals applied is consistent with the legal standard applied by other federal courts. *See e.g., Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 765 (3d Cir. 2004), as amended (Dec. 20, 2004) (affirming dismissal where plaintiff did not allege that he was discharged because of his claimed national origin or his religion); *see Pedreira v. Kentucky Baptist Homes for Child., Inc.,* 186 F. Supp. 2d 757, 761 (W.D. Ky. 2001) (dismissing religious discrimination claim that was premised on allegation that an employer's behavioral code of conduct has an alleged "religious motivation"); *see Kennedy v. Berkel & Co. Contractors, Inc.*, 319 F. Supp. 3d 236, 246 (D.D.C. 2018) (dismissing religious discrimination claim where the complaint did not suggest that the plaintiff's religious practices or beliefs had anything to do with her termination); *see Hood v. City of Memphis Pub. Works Div.*, No. 17-2869-SHM-DKV, 2018 WL 2387102, at *4 (W.D. Tenn. Jan. 8, 2018), report and recommendation adopted, No. 17-CV-2869-SHM-DKV, 2018 WL 648377 (W.D. Tenn. Jan. 31, 2018) ("Hood does not allege any facts indicating that he was discriminated against based on his religious beliefs or even that the City of Memphis was aware of his religion."); *see also Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 934 (7th Cir. 2003) (noting it is difficult to see how an employer can be charged with religious discrimination when they do not know the employee's religion and finding plaintiff did not show that he was fired due to his religious beliefs); *see generally Chhim v. Univ. of Texas at Aust*in, 836 F.3d 467, 471 (5th Cir. 2016) (affirming dismissal of employment discrimination claim where the complaint did not allege any facts that would suggest the employer's actions were based on the employee's protected characteristic);

Connelly v. Lane Const. Corp., 809 F.3d 780, 789 (3d Cir. 2016) (reversing dismissal of a Title VII discrimination claim, finding plaintiff's allegations were sufficient as they "raised a reasonable expectation. . ." that her "protected status. . . played either a motivating or determinative factor in. . .[the] decision not to rehire her. That is enough for. . . [her] disparate treatment claim to survive a motion to dismiss");

Accordingly, the premise of Dr. Giurca's argument is wrong and therefore does not warrant granting certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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